

**Coca-Cola Bottling Company of Buffalo, Inc. and
Market Produce, Warehouse, Frozen Food,
Cannery Workers, Drivers & Helpers, Local
Union 558, of the International Brotherhood of
Teamsters, AFL-CIO. Case 3-CA-14611**

April 13, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 31, 1993, Administrative Law Judge Robert T. Snyder issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and an exception.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Coca-Cola Bottling Company of Buffalo, Inc., Tonawanda and Orchard Park, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ We note that at par. 2 of the decision, the third sentence should state in relevant part, "Upon due notice, a hearing was held in Buffalo, New York, on February 24 and 25, 1992"

² In its exceptions, the Respondent contends, inter alia, that the General Counsel failed to carry his burden regarding employee McKissock's gross backpay. In support of this contention, the Respondent relies on *Ford Bros.*, 284 NLRB 211 (1987). We find *Ford Bros.* distinguishable. Although both the instant case and *Ford Bros.* involve the "lost-work" theory of backpay liability, in the instant case the General Counsel met his burden by submitting a seniority list even though the list was that in effect after the end of the backpay period. In *Ford Bros.*, supra, the Board found the "lost-work" theory invalid as a measure of backpay liability since the record evidence cast doubt on the validity of the underlying assumption that the most lucrative jobs were performed by the most senior employees.

³ The General Counsel has excepted to the judge's proposed remedy insofar as it provides that interest on the contributions to be made by the Respondent to the Union's Pension and Retirement Fund is to be calculated in the manner prescribed by *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We find merit in the General Counsel's exception and modify the remedy accordingly.

Ronald Scott, Esq., for the General Counsel.
James A. Prozzi, Esq. (Jackson, Lewis, Schnitzler & Krupman), of Pittsburgh, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

ROBERT T. SNYDER, Administrative Law Judge. On September 27, 1990, the National Labor Relations Board issued a Decision and Order,¹ concluding that the Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, refusing to recognize the Charging Union as the collective-bargaining representative of its employees employed at its Orchard Park, New York facility, and refusing to apply to the latter employees the terms and conditions of its collective-bargaining agreement with the Union covering warehouse and production employees employed by the Respondent at its Tonawanda, New York facility. On June 27, 1991, the United States Court of Appeals for the Second Circuit entered its judgment² enforcing in full the backpay provisions of the Board's Order. Those provisions required the Respondent to make whole the unit employees employed at Orchard Park for any loss of wages and benefits they may have suffered because of Respondent's failure to apply the terms of the agreement to them, and to make whole the Union for any moneys that would have been due it under the terms of the agreement.

A dispute having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director for Region 3, pursuant to authority conferred on him by the Board, issued a backpay specification on October 31, 1991. Respondent filed timely answer thereto on December 4, 1991. On due notice, a hearing was held in Buffalo, New York, on February 24 and 25, 1993, on the issues raised by the pleadings. All parties were afforded a full opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. Posthearing briefs filed by the General Counsel and the Respondent have been carefully considered.

Subsequently, on November 9, 1992, the Respondent filed a motion with the Board to set aside the Board's Order and dismiss the compliance specification. In its motion, Respondent relied on the Board's decision in *Gitano Distribution Center*, 308 NLRB 1172 (1990), in which the Board decided that in cases when an employer transfers a portion of its employees at one location to a new location, it will no longer utilize a "spinoff" analysis but will rather look to see whether the majority of employees at the new location were transferees from the original bargaining unit, in determining whether the Respondent is obligated to recognize and bargain with the Union for the employees at the new location. Id. In *Coca-Cola Bottling Company of Buffalo*, supra, the underlying decision, the Board found that the Respondent's Orchard Park facility was a spinoff from its Tonawanda warehouse operation although one of the four employees at Orchard Park transferred from a unit position at Tonawanda to a unit position at Orchard Park. The Board referred to these conclusions and facts in fn. 22 of *Gitano Distribution*, supra.

The General Counsel opposed the motion, contending that the Board lacked authority to modify its Order where, as in the instant case, that Order had been enforced by the court.

The Board issued an Order on November 30, 1992, denying Respondent's motion to set aside its September 27, 1990 order, and referring the branch of the motion to dismiss the

¹ *Coca-Cola Bottling Company of Buffalo*, 299 NLRB 989 (1990).

² Reported at 936 F.2d 122.

compliance specification to me for further action consistent with the Order.

The Board ruled that it lacked jurisdiction to set aside its earlier September 27, 1990 order under Section 10(e) of the Act, since it had been enforced by the court. The Board noted that under that pre-*Gitano* order, Respondent had contractual liability that it must satisfy and payments for that liability it must make before the case could be closed on compliance. The Board refrained from passing on the issue of the effect of *Gitano* on periods subsequent to the Respondent's compliance with the Board's Order.

Following issuance of this November 30, 1992 order by the Board, Respondent filed with the Second Circuit Court of Appeals a motion to recall mandate and set aside the Board Order of September 27, 1990. That motion was denied by order of the court filed February 1, 1993.

In view of the foregoing rulings, I am prepared to determine Respondent's liability under the Board's original Order. On consideration of the entire record herein and on my observation of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. THE BACKPAY SPECIFICATION AND ANSWER

The specification claims backpay on behalf of three employees, Michael Haug, Melvin Mingoia, and John McKissock as well as contributions to the Union's Pension and Retirement Fund on behalf of each of the three. The backpay period begins the week ending July 24, 1988, when the Respondent opened the Orchard Park facility and staffed it with four employees, a supervisor, and the three backpay claimants. It ends the week ending June 9, 1991, when Respondent changed the nature of its operation at Orchard Park and transferred back to Tonawanda and included in the warehouse and production employee bargaining unit covering that facility the three backpay claimants.

During the backpay period, the Respondent and Union were parties to a collective-bargaining agreement, effective from June 1, 1987, to May 31, 1990, and a successor agreement, effective from June 1, 1990, to June 4, 1994.

The specification sets forth the contractual hourly wage rates and hourly shift premiums in effect during the relevant periods. The hours each claimant worked during the period for which a claim is made was multiplied by the appropriate hourly wage rate for each calendar quarter to arrive at gross backpay, and then from those figures the actual wages received by each employee was then deducted to arrive at net backpay.

In particular, with respect to the amount of backpay claimed on behalf of John McKissock, the specification in fn. 4 asserts that for those weeks during the period of his claim when he was laid off for all or parts of them, had Respondent adhered to the terms of the collective-bargaining agreement, McKissock's seniority would have allowed him to work a full 40-hour workweek. The sum claimed for McKissock, \$16,257.27, far exceeds the claims for Haug and Mingoia which are \$959.91 and \$1,565.77, respectively. In determining the remittances due to the Union's Pension and Retirement Fund, the total number of hours worked (up to a maximum of 40 hours each week) by all unit employees during the backpay period was multiplied by the applicable

fringe benefit contribution rates in effect under the agreements during those periods of time.

In its answer, Respondent disputed the net backpay calculations for John McKissock, in particular. Respondent claimed that McKissock worked part of his backpay period in a nonbargaining unit position of driver/merchandiser. Since he was not available for loading and related bargaining unit work during these periods, they should be excluded from the total weeks covered by his claim. Respondent also asserted that inasmuch as another employee hired in the Tonawanda bargaining unit at the same time as McKissock, a Michael Kriegbaum, was laid off for certain weeks, McKissock would have likewise been laid off in those weeks and his claim would have been accordingly reduced by these periods of layoff.

As to the contributions due to the Union Pension Fund, Respondent argued that no amounts were owed to the Fund. Respondent asserted that it had made contributions on behalf of Haug and McKissock to its own Pension Plan which exceeded those which would have been required under the collective-bargaining agreements and that Mingoia was no longer employed by it and thus would not benefit from any contributions made on his behalf to the Fund. In reliance on *Manhattan Eye, Ear & Throat Hospital v. NLRB*, 942 F.2d 151 (2d Cir. 1991), given these facts, any sums required to be paid to the Union Fund would constitute a windfall exceeding the Board's remedial power and thus would be unenforceable.

II. THE EVIDENCE PRESENTED, ANALYSIS, AND CONCLUSIONS

A. *The Backpay Claims of Haug and Mingoia*

1. The claim for *Michael Haug* began the week ending July 9, 1989.³ The original claim contained in the specification listed Respondent's liability in the amount of \$959.91.

However, at the hearing, the General Counsel and Respondent stipulated to Haug's receipt of additional pay, in the sum of \$584.12 for the third quarter of 1990, and \$343.58 for the second quarter of 1991. Neither of these payments were included in the totals for wages earned for those quarters. As a consequence of these additional gross wages, Haug's claim for lost wages now asserted by the Government totals \$136.98.

2. The claim for *Melvin Mingoia* begins for the week ending July 24, 1988, on his transfer from a unit position at Tonawanda to Orchard Park. Respondent's total liability alleged was \$1,565.77. At the hearing, the parties stipulated that the gross backpay alleged as owing to Mingoia should be reduced by \$498.70 for the third quarter of 1988, by \$435.75 for the second quarter of 1989, and by \$554.35 for the fourth quarter of 1989, since he received paychecks for these amounts in those quarters even though they were not reflected in the specification.

In its brief, the General Counsel also agrees with Respondent's defense that with respect to all but the last week of the

³ Although not otherwise explained on the record, just as with John McKissock, whose claim began for the week ending August 6, 1989, Haug, who was transferred to Orchard Park from a nonunit position at Tonawanda, probably was paid the probationary rates under the contract for 1 year thereafter, eliminating any backpay claims for that period.

third quarter of 1988, Mingoia's wages should have been calculated at the contract probationary rate, thereby independently voiding any liability for that quarter.

As a consequence of the foregoing, Respondent's alleged liability of \$498.70 for the third quarter of 1988, \$220.22 for the second quarter of 1989, and \$500 for the fourth quarter of 1989, are all fully offset. These offsets result in a revised, net backpay liability of \$296.37, which represents the net difference between Mingoia's third quarter 1989 earnings of \$6,007.59, and the sum of \$6,303.96 which he would have earned under the collective-bargaining agreement if it had been applied to him.

However, as the General Counsel notes at page 6 of its brief, while the specification (G.C. Exh. 1c, p. 2), shows Mingoia having worked 40 hours during the week ending August 13, 1989, the "wages earned" column for this week is blank. The General Counsel speculates that Respondent may have inadvertently failed to produce evidence of payment to Mingoia for that week.

There was uncontradicted testimony that Field Examiner Sandra Nuereuther examined and checked Respondent's payroll records and timecards located at its Tonawanda facility in calculating the figures to be included in the backpay specification under the supervision of Region 3 Compliance Officer Richard Friend. Yet, as the General Counsel notes, it is highly improbable that Mingoia could have worked 40 hours in that week without having been paid for that time. Thus, the General Counsel offered in its brief to reexamine its position regarding Respondent's liability toward Mingoia should Respondent produce posthearing evidence, subject to verification, that show Mingoia's earnings for the week of August 13, 1989.

Although such a proffer has not been made to date, Respondent's most recent concentration on its arguments, ultimately unsuccessful, seeking reversal of any liability in this case because of the Board's rejection of its "spinoff" theory of violation in *Gitano*, supra, may explain its failure up to now to seek to correct this apparent anomaly. In any event, while I am satisfied that on the record before me the General Counsel has established Respondent's circumscribed liability toward Mingoia, in view of the General Counsel's offer, I will permit Respondent to produce for the General Counsel's inspection and review during the period during which exceptions may be filed by it in this proceeding, evidence, subject to verification, which may relieve it of any backpay liability whatsoever toward Mingoia.

B. McKissock's Backpay Claim

John McKissock's backpay period begins for the week ending August 6, 1989, on the completion of his 1-year probationary period during which his salary gradually increased and reached journeyman level. Unlike either Haug or Mingoia, McKissock's pay record shows that for all the quarters but one, and for all the weeks in one particular quarter, the first quarter of 1990, he was laid off for all or a portion of particular weeks. These weeks, in each of which McKissock is credited on the specification with 40 hours of work, are noted by asterisks in the regular hours column of the specification exhibit relating to McKissock. Nevertheless, in many of those same weeks, McKissock also worked overtime hours, which, under the collective-bargaining agreement, were required to be paid at time-and-a-half the regular rate

for all hours worked over 8 in a day, 40 in the week or on Saturday and at double time for all Sunday work, and the specification also lists them in separate columns. However, Respondent did not pay McKissock the overtime pay for the overtime hours listed in the specification. Neither did Respondent credit McKissock with a full 40-hour workweek for each of these weeks in which he was laid off in whole or in part. These differences are reflected in the General Counsel's claim of liability for backpay on the one hand and Respondent's reduced figures for which it admits responsibility, on the other. The General Counsel seeks net backpay for McKissock of \$16,257.27 and Respondent acknowledges responsibility for only \$2852.

In seeking to establish that McKissock would not have been laid off if the collective-bargaining agreement had been applied to him during the weeks in which he was in part laid off and would have earned overtime pay as well, the General Counsel relies on the seniority provisions of the contracts as applied to McKissock. The provisions, which appear in article IV, Seniority, section C. Where Layoff is a Factor, subsection 2. Layoff and Recall, remained unchanged under the old and new agreements in effect during McKissock's backpay period:

C. Where Seniority is a Factor

1. Filling Vacancies

Where the ability to perform the work is relatively equal, the employee with the greatest plant seniority shall have the first opportunity to be considered for filling permanent vacancies.

2. Layoff and Recall

Where the ability to perform the work is relatively equal, the employee with the greatest departmental seniority shall be the last to be laid off and the first to be rehired.

. . . .

b. A laid off employee with greater plant seniority shall have the right to "bump" an employee with less plant seniority provided the senior employee has the ability to perform the job without a training or breakin period. "Bump" is hereby defined as the right of a laid off employee to exercise the option to stay on in a retain job, thus, forcing a less senior employee into layoff status. If the job bumped into pays a lesser rate of pay, the bumping employee will receive the lesser rate.

An employee may not "bump" into a higher or lower paid position or a shift other than his normal shift unless he/she is unable to "bump" because of seniority or qualification.

3. Overtime Opportunities

In providing overtime opportunities, employees will be given preference on the basis of departmental seniority and availability. For example, the sanitizer who has the greatest departmental seniority and is immediately available (as opposed to having to be called in) will be offered the opportunity to stay over for two hours after the completion of his shift to perform the sanitizing duties.

McKissock's name appears 21st on a Respondent bargaining unit seniority list prepared as of October 25, 1991, ahead of 14 other unit employees. His starting date, listed as July 25, 1988, is erroneous, and was actually July 5, 1988 (see R. Exh. 7(AJ)).

Testimony from both the General Counsel and Respondent witnesses adduced during the hearing establishes that, in practice, a laid-off employee may seek to exercise bumping rights only if the layoff is of more than 1 day's duration. The employee must first attempt to bump on his or her own shift. If precluded from doing so, by seniority or lack of qualification for the job, the employee may then exercise bumping rights on another shift. Bumping rights may not be exercised where the employee seeking to bump would require a break-in or training period.

McKissock was initially hired as a warehouseman at Orchard Park. The work entailed checking in the drivers, stripping or removing empty bottles, and loading the trucks. This work is also performed at Tonawanda, along with the production work of filling bottles with soda. Loading and stripping work at both locations was performed on a night shift, while production was done on the day shift. Had the seniority provisions of the agreement been applied to McKissock when he was laid off for more than a day, they would not have precluded his exercise of contractual bumping rights into the Tonawanda plant night shift.

The compliance agent's review of the Respondent's payroll records and timecards led, *inter alia*, to the conclusion expressed in fn. 4 of the specification that McKissock had the seniority status to remain employed at Tonawanda when he was laid off from his position at Orchard Park.

Respondent's defense to this allegation of liability consists, in part, of a reliance on the actual layoff incurred by a loading employee, Michael Kriegbaum, employed at the Tonawanda facility. On the Respondent's seniority roster, McKissock's name appears directly above the following named employees:

Nicholas Tiberio	August 16, 1988
Anthony Leavy	May 5, 1989
Donald Loops	May 25, 1989
Michael Kriegbaum	May 26, 1989

Tiberio performed loading and shipping work at all relevant times, as did Loops. Kriegbaum began loading in early 1990, after several months on days, sorting and working production. Leavy was a production employee until June 1991.

At the hearing Respondent produced timecards for Kriegbaum showing the various weeks during which he was laid off.

Respondent's argument on this point, gleaned from the hearing and its brief, is that in seeking to remedy the unfair labor practices, the only viable recreation of the facts that existed at the time of the violations when Respondent established a separate location and transferred employees to it, is to assume that Orchard Park never existed and that the three discriminatees were employed in the unit at Tonawanda. Respondent argues that the seniority provision of the agreement could only be applied to employees at Tonawanda because the distance—between 22 and 26 miles—and variation in size between the two warehouses—10,000 square feet at Orchard Park and 90,000 square feet at Tonawanda—meant that it would not be feasible, and would require a break-in period

for any employee, such as McKissock, laid off at Orchard Park, who sought bumping rights at Tonawanda, this precluding McKissock's employment while laid off at Orchard Park even if the contract covered Orchard Park. Respondent assumes further that if Orchard Park had not been opened, then Mingoia, Haug, and McKissock, in that order of seniority, would have replaced on the seniority roster, Tiberio, Loops, and Kriegbaum. Inasmuch as McKissock would then have been most closely related to Kriegbaum—in effect been “paired” with him—McKissock would have suffered loss of work every time Kriegbaum was laid off.

Respondent further argues that even if all six of these employees, the three discriminatees and the three others, had been employed at Tonawanda, McKissock would have also been laid off when Kriegbaum was, because they had been hired at the same time. This claim is contrary to the record evidence which shows McKissock starting on July 5, 1988, and Kriegbaum starting more than 10 months' later on May 26, 1989.

It is clear that Respondent's assumptions are not valid and comprise a clever but unsupportable effort to shield it from the direct consequences of its unfair labor practices.

The first assumption, that Orchard Park was never established, cannot be considered. Respondent's violation arose because it did establish another location to which it did transfer some unit work. The aim of the remedial process is to endeavor to place the discriminatees insofar as possible, in the position they would have been had the violation not taken place, *i.e.*, had the contract been applied to them at Orchard Park. See *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). This process does pose a problem for Respondent, because the contract, and its seniority provisions had never been applied to more than one location. But this fact should not create an insurmountable handicap to providing a meaningful yet reasonable remedy for McKissock.

Respondent would reach the result that under no circumstances could McKissock have bumped into the loading and stripping work at Tonawanda. In doing so, it assumes, improperly, that the logistics of physically working at a site more than 20 miles from his old one would have made his transfer under the bumping provision not feasible. Here, Respondent witness Lawrence Finnegan, its business manager, points to the fact that the decisions about the number of customer orders which require loading are made earlier the same day that the orders are processed in the evening. Salesmen call in orders during the day, they are placed on to a computer, and load sheets are then prepared for the dispatchers for distribution to loaders for the evening shift. Finnegan did not demonstrate in concrete terms how McKissock, who would have been laid off more than a day earlier at Orchard Park, would have been thereby precluded from reporting for evening shift work at Tonawanda or from receiving timely word that work was not available for him there, if such were the case. The fact that McKissock may have been required to travel a greater distance from his home to Tonawanda than from his home to Orchard Park to go to work would not have made McKissock's bumping rights unachievable. Respondent failed to show that other Tonawanda employees traveled less or that McKissock's travel time would have been excessive. The record fails to show McKissock's residence address. Further, as the record reflects, based on the testimony of witness Mingoia, even if McKissock had been

required to report first to one work location, before being dispatched to the other, Mingoia's experience shows that Respondent authorized daily employee travel between the two worksites for employees performing unit work, sometimes more than once a day. Mingoia, who lived in Niagara Falls, after his transfer to Orchard Park, routinely continued to punch in for work at Tonawanda and then delivered product by truck to Orchard Park, returning with empty product to Tonawanda at the end of his shift. Sometimes, he returned to Tonawanda during his shift for additional product if the truck or trucks he was loading were short product for delivery. On these daily trips, he was paid the same rate as he received for work at the Orchard Park warehouse.

Respondent's other assumption in this regard is that because of the considerable size differences between the two warehouses, McKissock would have required a break-in period, and therefore, would have been contractually ineligible to exercise bumping rights. It was Finnegan's opinion that McKissock would not have been able to locate the inventory within the 90,000-square-foot building in Tonawanda without a break-in and training period. But Finnegan's opinion is reached in a vacuum, a vacuum that one may reasonably infer would have been filled by union enforcement and administration of the collective-bargaining agreement. With the Orchard Park location covered by the agreement, it is reasonable to conclude that the parties would have been required to deal with the application of the seniority and bumping provision to the two location operation, either by way of bargaining or with a union grievance protesting Respondent's failure to interpret plantwide seniority for purposes of bumping to cover both locations, resulting in a settlement satisfactory to both parties or to an arbitration award favorable to the Union. At the very least, a contract modification requiring early distribution of Tonawanda warehouse product layout information, diagrams, and written instruction material to employees such as McKissock who had not previously worked at Tonawanda, in addition to a visitation by such employees to the Tonawanda warehouse prior to their exercise of bumping rights there could have served to satisfy Respondent's concerns and the conditions of the contract.

Any ambiguity resulting from the absence of a history in applying the bumping provision to the Orchard Park facility employees must be resolved in favor of the discriminatee McKissock and against the wrongdoer who failed and refused to apply the collective-bargaining to him and thereby committed the unfair labor practice and must comply with the Board's Order by satisfying the contractual liability it owes him. See *United Aircraft Corp.*, 204 NLRB 1068 (1973):

[A]s the courts and the Board have generally indicated, the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. [See also cases cited at fn. 3.]

Surely, Respondent should not be heard to complain about an interpretation of the collective-bargaining agreement as applied to its Orchard Park operation reasonably designed to remedy its unfair labor practice of refusing to apply the agreement at all to that operation. Put another way, as did

the General Counsel in its brief, it would be inequitable to allow Respondent to avoid liability for refusing to apply the contract by unilaterally interpreting the very contract it refused to apply in the first instance.

As to the backpay formula selected by the General Counsel and its computations of gross backpay, in particular, its allegation in fn. 4 that McKissock's seniority would have allowed him to work a 40-hour workweek, history teaches us that in compliance cases it is sufficient for the Government to select a formula which reasonably approximates the loss the discriminatee suffered where greater accuracy is unlikely to be achieved. As the Board has long recognized:

The determination of gross backpay, for example, is not always a matter of arithmetic for . . . questions can arise concerning how much the claimant would have earned had he not been discharged. In cases in which such questions exist, the Board 'may use as close approximations as possible, and 'may adopt formulas reasonably designed to produce such approximations.' [International Trailer Co. and Gibraltor Industries, 150 NLRB 1205, 1207, JD sec. II,A (1965), cited with approval in *J/B Industries.*, 245 NLRB 538, 541-542, JD sec. III.]

As noted by the court in *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963), "In solving the problems which arise in backpay cases the Board is vested with a wide discretion in devising procedures and methods which will effectuate the purposes of the Act." When reviewing the formulas used by the Board, the court's inquiry is ordinary limited to satisfying itself that the method selected is not "arbitrary or unreasonable in the circumstances involved." *Id.* at 453.

Based on the record made herein, I am satisfied that the General Counsel's method of computing McKissock's gross backpay, in particular, constitutes a reasonable approximation of his lost earnings given Respondent's conduct in failing and refusing to apply the collective-bargaining agreement to him at the Orchard Park location, and that it meets the time honored and court approved standards for its approval.

Respondent also argues that as McKissock "transferred" to the nonunit position of driver-merchandiser, he was unavailable for a full week of work during 13 listed week in which the specification claims McKissock would have earned wages under the contract in most weeks for unit work in excess of 40 hours.

In support of this defense Business Manager Finnegan testified that on April 5, 1989, in accord with a personnel file document showing McKissock's change in position from warehouseman at \$8.75 per hour, to driver/merchandiser at \$6 an hour, with a 90-day review for an opportunity for an increase, McKissock "determined that he would like to be a driver/merchandiser and applied for that." (Tr. 75.) Even after this date, McKissock continued to function as warehouseman. Another personnel document shows McKissock receiving a salary increase of \$1.50, to a new warehouseman's rate of \$10.15 an hour because he had achieved 1-year service time with acceptable performance, effective July 5, 1989. Finnegan explained that McKissock had been provided the opportunity to fill in in the warehouse

or also work in the warehouse while he was continuing to work as a driver.

As of October 5, 1989, McKissock, having passed his 90-day review, received a 50-cent salary increase to \$7 as driver, and on April 7, 1990, this rate was increased another 25 cents to \$7.25 an hour. On April 1, 1991, McKissock's salary as warehouseman was also increased from \$21,320 annually to \$22,279.40, before his transfer back to the Tonawanda facility as a regular bargaining unit sorter on June 5, 1991, when the Orchard Park loading and shipping work ceased and the backpay period ended.

Finnegan acknowledged that McKissock performed very little driving work during his last year employed at Orchard Park. He began to have the option to fill in in the warehouse and asked to work in both positions when work fell off as driver/merchandise.

Under cross-examination, Finnegan agreed that when assigning work to McKissock as a driver during the backpay period, Respondent did not bargain with the Union about the matter. Contrary to Finnegan's direct testimony, he also acknowledged that driving work was permitted for Tonawanda unit employees on a temporary basis under both the old and the successor labor agreements.

John McKissock's testimony about the genesis of his driving work was at substantial variance with Finnegan's version. He recalled that he started to drive trucks for Respondent, shortly after completing his first year of service at Orchard Park in July 1989. He was loading one night with Chick Riggs, a supervisor, who told him he would not be needed the following week, that he would be laid off. About a week later, while still on lay off, McKissock testified he was approached by Mike Smith, department manager of the premix area, about possibly taking a premix job, delivering CO₂ tanks and cans for soda fountain drinks to customers. Smith offered him \$5 an hour, and McKissock refused as he was then receiving more on unemployment compensation. Later, when McKissock visited the facility to check on work availability or to pick up a paycheck, he was approached by another supervisor, Jeff Joy, about obtaining a class 1 driver's license necessary for driving a truck. McKissock agreed to do that, received some training, and started driving work but at \$6 an hour in October 1989.

According to McKissock, he never filled out a formal application to drive or responded to any posting of a job opening. McKissock viewed the opportunity to earn a class 1 license as a useful qualification for possible further employment by a trucking company if he ever left the Respondent's employ.

After McKissock started driving he continued doing so, days, on an irregular basis whenever loads were available because a regular driver called in sick at either Tonawanda or Orchard Park. He also continued to perform warehouse work at Orchard Park at night when such work was available and he was called in to perform it. In spite of the driving work assigned, McKissock was unaware of any formal change in his job title from warehouseman, and he did not see any of the payroll change forms received in evidence. After only a couple of weeks or a month of driving he was pulled off the truck and told he would be doing both driving and warehouse work. On one occasion, after working 8 to 10 hours overnight in the warehouse, he agreed to take a truck out in

the morning but only if he was paid his full loading rate. Respondent agreed.

Although McKissock later acknowledged, under cross-examination, that he started driving in April 1989, rather than October, he continued to maintain that it was as a result of Respondent's agents having approached him about performing driving work while on lay off rather than any interest on his own, which led to his driving assignments.

McKissock's personal account of the manner of his obtaining and continuing to perform driving work for Respondent is credited over Finnegan's because based on his conversations with Respondent agents' whose statements have not been contradicted as well as McKissock's generally trustworthy and detailed presentation in contrast to Finnegan's more general, misleading, and ambiguous testimony. Thus, for example, Finnegan's statement that McKissock determined he would like to drive and applied for the position hardly explains the circumstances under which these assignments came about, following McKissock's layoff and loss of warehouse work.

It is evident from the foregoing that McKissock's agreement to perform driving work was a means of his avoiding further loss of the much higher paid warehouse work. McKissock had no real option in the matter, and to claim, as Respondent does, that McKissock voluntarily declined warehouse work opportunities by accepting nonunit assignments is preposterous. First, had Respondent provided McKissock with the overtime opportunities it was required to under the bumping provision of the agreement, the driving option would not have been made available to McKissock. Second, since Respondent's conduct in permitting McKissock to perform in a regular, hybrid position not permitted to employees in the Tonawanda bargaining unit was part and parcel of its unlawful conduct in not applying the contract to Orchard Park employees, Respondent should not be permitted to benefit unlawfully from McKissock's multiple assignments, by claiming he was thereby "unavailable" for unit work. If Respondent had applied the agreement to Orchard Park, not only would McKissock have been able to bump into Tonawanda, according to Finnegan he would have been required to withdraw from the Union on performing driving work, and McKissock was never presented with this option. McKissock did not voluntarily decline unit work, because there was no bargaining unit at Orchard Park. In fact, whenever the work was available he was assigned it; his driving work as a filler benefited Respondent and contributed to a more efficient operation and should not serve to disqualify McKissock for the day-to-day vagaries of his work assignments. In any event, McKissock's earnings as driver/merchandise have been taken into account as actual wages received and deducted from gross backpay in arriving at his net backpay totals.

The burden of proving any mitigation of damages is on the Respondent, the General Counsel being required to show only the gross amounts of backpay due. See *Kansas Refined Helium*, 252 NLRB 1156, 1157 (1980). I am satisfied that on this question of McKissock having allegedly made himself unavailable for unit work, Respondent has failed to sustain its burden of proof by a preponderance of evidence that McKissock has forfeited claim to any weeks of backpay by accepting driving assignments, and I reject its affirmative defense.

C. The Claim for Contributions to the Union's Pension and Retirement Fund

In disputing the portion of the make-whole remedy requiring reimbursement of the Union's Pension and Retirement Fund for all contributions due the Fund on behalf of the three claimants for the duration of the backpay period, a sum of \$10,970.80, Respondent relies exclusively on the holding of the court in *Manhattan Eye, Ear & Throat Hospital v. NLRB*, 942 F.2d 151 (2d Cir. 1991). I conclude that the *Manhattan* case is readily distinguishable from the instant one and its holding may not defeat the claims asserted herein.

The evidence shows that both collective-bargaining agreements in effect during the backpay period required set contributions to be made by Respondent to the New York State Teamsters Conference Pension and Retirement Fund per hour per employee for each week subject to a maximum of 40 hours. The rate of contribution was, as alleged in the specification, 60 cents per hour through the week ending December 31, 1988, and .625 per hour from January 1, 1989, to June 9, 1991. Respondent does not dispute these provisions, nor that it executed the Fund Participation Agreements required under the clause for each of the two bargaining agreements.

A May 1981 booklet was also introduced into evidence which constitutes a summary plan description of the Pension Plan governing the jointly trusted Fund. It describes in detail how to calculate future and past service credits, types of pension benefits provided, the manner of computation of the monthly benefit, requirements for vesting, and related matters.

Because of questions which were raised regarding these subjects as well as others under the Plan as presently administered, an agreement was reached to hold an off-the-record joint long-distance conference telephone call with Fund Administrator Al Sgaglione, who was unavailable as a witness at the time of the scheduled hearing. A speaker phone call was held with Sgaglione, present at which were representatives and counsel for all parties. As a result of the questions asked, and answers received a stipulation of fact was entered into evidence providing the following information regarding the operation of the Fund under the plan.

The Plan contains a 10-year vesting requirement, meaning a covered employee has a right to a pension at age 65 upon 10 years of credited service for which contributions have been made to the Fund by one or more contributing employers. An individual not vested in the Plan would lose all credits on a 3-year break in service. Individual accounts are maintained for each employee on whose behalf covered employers have made contributions. If payments were made for the 1988–1991 backpay period under this proceeding by order of the Board, they would be received and credited to the account of the individual claimants if they had accounts in the Fund. Contributions so made would also be credited toward their continuous service requirement. Contributions made to the Fund by a participating employer prior to an employee's service with Respondent would also be credited to the individual's account. The Fund has no reciprocal agreements with plans or funds not under its own authority or administration. Since the 1981 publication, which listed a past service benefit equal to the number of years of past service credit multiplied by \$16, the current amount by which each

year of credited service is multiplied to determine the monthly benefit, is \$35. Sgaglione also agreed to provide the past credits under the Fund for Michael Haug and Melvin Mingoia, which both employees agreed may be released for use in this proceeding.

These documents show that since his initial participation in the Fund in 1969, through the year 1991, Haug had earned 12 years of service credits, so had a vested right to a pension. By close of 1991, Mingoia had earned 2.3 years of service credits and so had not vested. Mingoia had also been discharged from Respondent's employ in September 1991, so that if he was not reemployed by Respondent (or any other participating employer in the Fund) by September 1994, he would lose his past service credits toward vesting. Mingoia was not questioned about his current and future employment intentions, while on the witness stand, but he did file an unfair labor practice charge seeking his reinstatement on March 6, 1992. The charge alleged that he was terminated because of his previous testimony in the ULP phase of the instant proceeding. Although the charge was dismissed and no appeal was taken, it does manifest an interest in reemployment by Respondent and by inference, in the industry, including other employer participants in the Fund.

At the time of the hearing and Sgaglione's submissions, McKissock had not yet earned any full year of part service credits. However, by his continued employment he will be in a position to earn such credits and ultimately earn a vested right to a Pension.

The evidence further revealed that under a Pension plan established by Respondent for its nonunit employees, sponsored and administered by Abarta, Inc. of Pittsburgh, Pennsylvania, such employees receive vesting rights after 5 years of service. Among these employees are Michael Haug, who became 100-percent vested under the Respondent plan on June 1, 1991, before his transfer to coverage under the collective-bargaining agreement and the Union Fund later that month. Haug was then entitled to a monthly benefit at his normal retirement date of March 1, 2014, in the amount of \$90.49 payable for the remainder of his life. Other provisions of the Plan permitted reduced benefits on earlier retirement.

Contributions to this Plan in excess of those required under the collective-bargaining agreement were made on behalf of both Haug and McKissock during the periods of their nonunit employment.

It is Respondents' contention that under *Manhattan*, supra, it should be credited with those contributions and further, that since the vested benefit to be received by Haug is substantially the same as he would have received had he been employed under the agreement during the backpay period, Respondent should not be required to duplicate these benefits by contributing to the Union Fund. As to Mingoia, since his termination from covered employment requires him to become reemployed by a participating employer by 1994 and work for 6 years thereafter, his future interest in the Fund is speculative at best, and no past contribution should be required on his behalf.

This defense ignores McKissock entirely and his future interest in the Union Fund. It also ignores the fact that the added contributions required for the back period on behalf of both Haug and Mingoia would add to the pension benefit Haug is already entitled to receive at age 65, and to the credited years of service for Mingoia, thereby reducing by ap-

proximately 3 years, the years he will need to accumulate to achieve vesting if he becomes reemployed by a participating employer by 1994.

In seeking to apply the principles underlying the *Manhattan* decision to the instant proceeding, Respondent is stretching the points made by the court there beyond good reason.

First of all, the facts of *Manhattan*, have little relation to the facts of the instant proceeding. In *Manhattan*, unlike *Coca Cola*, supra, the employees had voted to decertify their bargaining representative. After the employer had placed the unit employees in management-run health and pension funds and contributed to them for several years, a second decertification election was ordered, and, on its eve, the Union negotiated to keep the employees in the management plans, and disclaimed further interest in representing them. The court refused to affirm the Board's Supplemental Decision and Order and remanded the proceeding to the Board to recalculate the remedy because it failed to benefit any of the employees, resulted in a windfall for the Union, and was ultimately punitive rather than remedial. Under the test established by *Sure-Tan, Inc.*, 467 U.S. 883, 900 (1984), the Board had failed to sufficiently tailor its remedy to the actual, rather than the merely speculative consequences of the unfair labor practices. The Board's reliance on the rationale of *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983), of a presumption that an employer's failure to contribute harmed the funds was improper in view of the disclaimer of the employees involved of all future interest in the Joint Benefit Fund and in fact that, although the employees might still have some economic stake in the Joint Pension Fund, the amount was still unclear, and may have constituted a windfall since the Board's remedy failed to recognize that the Union Joint Pension Fund and the Management Pension Fund had a reciprocal agreement under which each Fund recognized time accrued in the other program for determining whether pension rights have vested.

Clearly, two of the three claimants have a clear future interest in the Union Pension Fund. Even Mingoia may achieve vesting on reemployment by a participating employer by 1994 and a continued 3 years of employment, a far from speculative event.

None of the service credits received by McKissock under the Respondent's Pension Plan may be applied under the Union Plan to shorten the period of time necessary for his vesting under it, and Haug received no service credits toward his union pension for time accrued under Respondent's plan.

Unlike the situation in *Manhattan*, supra, the Union continues as exclusive bargaining representative of the unit employees, and both it and Respondent have a strong interest in maintaining the ability of the Union Fund to provide for future needs of employee participants. See *NLRB v. Transport Service Co.*, 973 F.2d 562 (7th Cir. 1992), where the court upheld a full reimbursement order after an employer's unlawful failure to make pension, health and welfare fund payments. The court acknowledged the inevitable impact of nonpayment on the future viability of the Fund, even though only three employees were implicated. Id. at 569. The court distinguished *Manhattan* on the ground that the Board had established, such as the instant record has established, concrete evidence of the employees' economic interest in the future of the funds and the Union's continued interest in representing them and securing that interest.

Just as the court held in *Stone Boat Yard*, supra, Respondent is in a poor position to complain about the extra costs when it had illegally withheld the payments.

I conclude that the *Manhattan* case is distinguishable and that Respondent is required to make the retroactive contributions sought in the specification. The *Manhattan* court did not hold that the Board is not empowered in the exercise of its broad remedial power to order restoration of the status quo ante where an employer unilaterally discontinues payments to union-sponsored benefit funds, supra at 159. The peculiar facts of *Manhattan* are absent here and because the Union and employee claimants both have continued economic stakes in the future financial stability of the Union Fund, I conclude that the Respondent has an obligation to make the payment to the Fund as called for in the specification.

THE REMEDY

For the reasons described above, I find that the obligations of Respondent to the discriminatees Michael Haug, John McKissock, and Melvin Mingoia will be discharged by the payments to them of the respective amounts as set forth in the following recommended Order. Such amounts shall be payable, plus interest on those sums, as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),⁴ but minus tax withholdings as required by Federal and state laws. I shall also recommend that Respondent make the following contributions on behalf the three discriminatees to the New York State Teamsters Conference Pension and Retirement Fund, with interest thereon, to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Coca-Cola Bottling Company of Buffalo, Inc., Tonawanda and Orchard Park, New York, its officers, agents, and assigns, shall make Michael Haug, John McKissock, and Melvin Mingoia whole by payment to them, and to the New York State Teamsters Convergence Pension and Retirement Fund on their behalf, the following sums, in accordance with the remedy section of this decision.

	Backpay	Contribution on Behalf of Employees to Pen- sion and Retirement Fund
Michael Haug	\$136.98	\$3,614.17
John McKissock	16,257.27	3,659.54
Melvin Mingoia	296.37	3,696.59

⁴Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.